United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

955

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 23,634

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 68, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR REVIEW OF A DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF OF PETITIONER

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ISSUES PRESENTED FOR REVIEW

I. Did the National Labor Relations Board correctly construe and apply secs. 8(a)(1) and (5) of the National Labor Relations Act, as amended (29 U.S.C. §158(a)(1) and (5)) to the facts of this case?

(a) Do the Board's findings justify its conclusion that Employer may withdraw from a multi-employer bargaining unit and renounce a contract negotiated on its behalf by a multi-employer association?

(b) Are the Board's findings that Petitioner and the employer association had breached faith with Employer or that Employer had established a prerogative entitling him

to bargain separately supported by substantial credible evidence?

II. Did the Board abuse its discretion in refusing to follow previously established principles governing the withdrawal from such a unit?

III. Did the Board abuse its discretion by deciding the case on grounds other than those upon which it was tried?

This case has not previously been before this Court.

REFERENCES TO RULINGS

The rulings on which the Decision to be reviewed is based are (1) the Decision of the Trial Examiner, and (2) the Decision of the Board (with a dissenting opinion) (178 NLRB No. 108), the text of which is appended to this brief.

STATEMENT OF THE CASE

This is an action under sec. 10(f) of the National Labor Relations Act, as amended, (29 U.S.C. par. 160(f)) to review and set aside a final order of the National Labor Relations Board (Board) which dismissed a complaint issued by the General Counsel of the Board, based upon a charge filed by Petitioner (Union) alleging that K. Jacobson and R. Haberman, d/b/a J-H Electric (Employer) had violated secs. (a)(1) and (5) of the Act (29 U.S.C. par. 158(a)(1) and (5)) by refusing to honor a collective bargaining contract with the Union.

THE PROCEEDINGS BEFORE THE BOARD

The Pleadings

The General Counsel's complaint alleged, in essence, that Employer had refused to honor or be bound by a col-

lective bargaining contract negotiated on its behalf by the Rocky Mountain Chapter, National Electrical Contractors Association, Inc. (NECA) with the Union in a multi-employer bargaining unit which included Employer (App. 338, 339).

Employer answered the complaint by denying that it was a member of the multi-employer unit set out in the complaint, and by asserting that it instead belonged to a different multi-employer group covering only employers in Weld County, Colorado which was the only appropriate unit and which Employer asserted had been "abandoned" by the Union and NECA. Employer further asserted that, although it was not necessary to do so, it was entitled by special circumstances to withdraw from the multi-employer group in Weld County and had in fact done so. (App. 331-335).

The Evidence

The 1965 negotiations: At all times material herein the Union has represented employees working in the electrical contracting industry in some 21 counties in northeastern Colorado, including the employees of Employer and other contractors in Weld County, Colorado (App. 228). All the contracting employers, including Employer, were represented by NECA and prior to the 1965 negotiations there were two separate negotiations (App. 113), one with the Weld and Larimer County[1] contractors and the other with the contractors in the remaining counties. Two separate contracts were signed, one covering the Weld and Larimer contractors (hereinafter referred to as the Weld County Agreements) (G.C. Ex. 8, App. 314-324) and the other covering the Contractors in the remaining counties (hereinafter referred to as the Area Agreement (G.C. Ex. 11,

[1]Since the Larimer County contractors are not involved in this proceeding references to them are hereafter sometimes omitted.

App. 297A). The contracts were generally similar except for such items as wage rates, the "Normal Market Construction Area" for Davis Bacon purposes and for union referral of workers, and pension benefits.

In the 1965 negotiations between the Union and the Weld County contractors who were represented by NECA, the question of cancelling the Weld County Agreement and including Employer and other Weld County contractors in the Area Agreement was discussed at length (G.C. Ex. 18, App. 259-263; Resp. Ex. 2, App. 391-392). In the last meeting between the Union and NECA where Employer was present, held on July 7, 1965, the Union agreed to accept the previous proposals of the Employer and other Weld County contractors to cancel the separate Weld County Agreement and include those contractors in the Area Agreement. In this meeting the Weld County contractors withdrew their proposal and offered different proposals, namely that there be a 2-year contract, a 40¢ per hour wage increase and a provision under which Weld County contractors would not be considered "outsiders" under the Area Agreement. The Union then withdrew its acceptance of prior proposals and the meeting ended with the contractors, including Employer, indicating they would give further thought to becoming a part of the Area Agreement but expressing the opinion that "Weld County problems could be handled by Weld County people." (Resp. Ex. 2, App. 392).

On July 23, 1965 the Weld County contractors met with NECA representatives, without Union representatives being present, and decided to cancel the Weld County Agreement and become part of the Area Agreement with the exception of retaining a wage differential, and the Union was so advised (G.C. Ex. 19, App. 257, 258). The issue of the precise wage rate was submitted to and decided by the Council on Industrial Relations.

On September 15, 1965 the parties consummated their understanding by executing two agreements: a Cancellation Agreement which provided that the current Weld County Agreement would be null and void and that the Weld County terms and conditions of employment would thenceforth be covered in the Area Agreement (G.C. Ex. 17, App. 264). The second agreement entitled "Agreement Covering Weld County, Colorado," provided for a change in anniversary dates to correspond with the Area Agreement, and provided that the Area Agreement would be amended as of October 1, 1965 to exclude Weld County from a Health Benefit Account, to add Weld County to the Normal Construction Labor Market and to provide specified wage rates for Weld County (G.C. Ex. 16, App. 265-269). These provisions were then incorporated physically into the Area Agreement referred to as the Red Book Agreement, or the April 1, 1965 agreement (G.C. Ex. 9, App. 307-313).

On March 3, 1966 Employer executed and transmitted to the Union, at the request of NECA, the following Letter of Assent:

> "This is to certify that the undersigned firm has examined a copy of the labor Agreement between the Rocky Mountain Chapter, NECA, Inc., and Local Union No. 68, IBEW, dated and effective the 1st day of April, 1965.
>
> The undersigned firm hereby agrees to comply with all the terms and conditions of employment contained in the aforementioned Agreement and all approved amendments thereto. It is further agreed that the signing of this Letter of Assent shall be as binding on the undersigned firm as though it had signed the above referred to Agreement and any approved amendments thereto.

In signing the Letter of Assent the undersigned firm does hereby authorize the Rocky Mountain Chapter, NECA, as its collective bargaining representative for all matters contained in this Agreement or pertaining to this Agreement. This authorization to the Rocky Mountain Chapter, NECA, shall remain in effect until terminated by written notice to the parties of the aforementioned Agreement 30 days prior to the notification dated provided for therein." (G.C. Ex. 3, App. 329).

On March 14, 1966, also at the request of NECA, Employer signed and NECA transmitted to the Union the following Bargaining Authorization Agreement:

"IT IS HEREBY AGREED between the undersigned firm engaged in the business of electrical contracting and the Rocky Mountain Chapter, National Electrical Contractors Association, hereinafter referred to as the "Association."

That the undersigned firm does hereby authorize and appoint the Association to act as bargaining agent and representative in matters of labor negotiations and labor relations, and authorize said Association to negotiate agreements and amendments to agreement on behalf of this firm with Local Union No. 68 of the International Brotherhood of Electrical Workers; and the Association agrees to act as bargaining agent and representative and to use its best efforts to secure the most reasonable terms obtainable on behalf of the undersigned firm and other firms represented by the Association. This

> authorization and agreement shall continue in effect from year to year unless and until terminated by either the undersigned firm or the Association upon sixty (60) days' written notice, *provided* that this agreement is coupled with an interest and is irrevocable by either party and may be terminated only on consent of both parties during the period between December 1st of any year and April 1 of the year immediately following." (G.C. Ex. 4, App. 328).

The 1966-67 negotiations: After the execution by Employer of the two Agreements, the Letter of Assent, and the Bargaining Authorization referred to above there were no more meetings at which the Union and Employer sat at the same bargaining table. The last such meeting was actually held on July 7, 1965. Employer was not present at any subsequent negotiations and bargaining on its behalf was conducted entirely by NECA representatives.

Both NECA and the Union served notice to reopen the Area Agreement late in 1966 (Resp. Ex. 5, App. 376, Resp. Ex. 6, App. 380). The Union's proposals included a request to delete Article 6.18, which includes wage rates, and to make wages uniform in the entire jurisdiction of the Local Union (App. 381). NECA's proposals were for a flat per hour increase (378).

The first meeting was held on December 15, 1966. Employer did not attend. The NECA representative stated: "It is understood that Section 6.18 (L) and (W) (pertaining to Larimer and Weld County wage rates) would be considered by the people in the area covered by the same." (Resp. Ex. 10, App. 366). To this, the Union replied:

> "Why aren't representatives of the Larimer and Weld Counties' area here? We would like to

> make it clear that we do not intend to travel into their areas to have them negotiate parts of this agreement. We consider that all negotiating concerning this agreement are carried on in this location at this table. If they have any interest in these matters, this is where the action is, this is where the things will happen and we don't intend to sit around for hours negotiating small parts and pieces of this agreement to satisfy their particular situation. Our representatives are here. This is where the decisions are made concerning the entire jurisdiction and if they are interested they should be here." (Resp. Ex. 10, App. 367).

On December 21, 1966 the NECA representative met with Employer and other Weld County contractors (Resp. Ex. 9, App. 368). The NECA representative told them of the Union's position on separate negotiations set forth above. Employer took the position that there should be separate negotiations and also apparently concluded that the Union had not reopened the Weld County rates because it had not specifically mentioned Sec. 6.18 (W) (although it had requested uniform rates under Sec. 6.18) (App. 368). The Weld County contractors accordingly voted to delete any reference to Sec. 6.18 (W) from NECA's reopening notice and to meet again if the Union requested negotiations on Weld County rates (App. 368). NECA notified the Union that its proposals on Weld County rates were being withdrawn (Resp. Ex. 11, App. 363). No request was made in the letter for separate negotiations with the Weld County employers, but it was stated that they stood "ready to meet."

On January 27, 1967 NECA held another meeting with Employer and other Weld and Larimer County contractors, the final result of which was that they agreed to increases

in rates which had previously been negotiated by NECA. (Resp. Ex. 12, App. 362). Thereafter a number of disputed items in the Area negotiations were submitted by the parties to the Industrial Relations Council for decision and the Council decision resulted in new wage rates which lowered the differential between the Weld County rates and the other rates in the agreement. (G.C. Ex. 10, App. 298-306). The completed agreement was then printed in the form of Amendments to the basic 1965 Red Book Agreement with the statement that "The amendments herein contained constitute such changes as were jointly and *locally* negotiated . . . " (emphasis supplied). Throughout the negotiations the Union had pressed for uniform wage rates (App. 158).

The 1967-68 negotiations: The Area Agreement was reopened by the Union on November 29, 1967 and the elimination of the Weld County differential was again proposed (Resp. Ex. 8, App. 370-373). NECA submitted its proposals to the Union on December 1, 1967 including a proposal to delete section 6.18 (W) "to establish wage scales . . . as will best establish a uniformity . . . to the entire geographical jurisdiction . . . " (Resp. Ex. 7, App. 375). Copies of the proposals were not sent to Employer.

On December 28, 1967 in a negotiation meeting with NECA, the Union proposed a uniform wage scale with a differential for Weld County on contracts where the total cost was $5,000 or less (G.C. Ex. 20, App. 253). The NECA representative thereafter studied building permits in Weld County and at the next meeting on January 11, 1968 advised the Union that the differential seemed to be fair (Resp. Ex. 16, App. 344).

Sometime in January, before final agreement was reached between NECA and the Union, the NECA representative met with Employer and advised that the Union would refuse to bargain with Employer and other Weld and Lari-

mer County contractors "as Weld and Larimer County groups" (App. 066) or "as individuals or as units from these areas" (App. 242). The contractors were also advised that the area rates being negotiated would apply to them (App. 066). The $5,000 wage differential was not discussed (App. 242). Employer stated that it could not go along (App. 067) but took no action to notify the Union of its position.

On January 30, 1968, NECA sent Employer an "Amended Outline" including the uniform rates which had been agreed upon (G.C. Ex. 14), and on February 6, 1968 NECA sent Employer a Bulletin with wage classifications and rates attached (Resp. Ex. 17, App. 341-343).

On February 7, 1968 final agreement was reached between the Union and NECA and reduced to Booklet form (G.C. Ex. 11, App. 297A) embodying amendments to the Red Book Agreement to terminate on April 1, 1970.

In March, Employer advised the Union by phone that it would not go along with the wage increases (App. 058-059). On April 9, 1968 the Union advised Employer it felt Employer was bound by the amendments (G.C. Ex. 5, App. 327). On April 12, 1968 Employer advised the Union in writing that it was terminating the Agreement and would not pay the wage increases effective April 1, 1969 (G.C. Ex. 6, App. 326). On the same day Employer requested that NECA withdraw its name from the NECA negotiating list (G.C. Ex. 7, App. 325).

Additional facts bearing on the negotiations will be referred to in the course of our argument.

The Trial Examiner's Decision

The Trial Examiner rejected Employer's argument that it was not a part of the 21-county multi-employer bargaining unit and found that Employer "did become a part of the broad area-wide multi-employer bargaining unit" and

that the unit was "an appropriate bargaining unit" (App. 015). The Trial Examiner concluded, however, that NECA and the Union had denied Employer "any meaningful opportunity to participate in the 1968 negotiations," that this constituted a "breach of faith" and that the Board should "stay its hand" and not find an unfair labor practice in the Employer's untimely withdrawal from the multi-employer bargaining unit and its renunciation of the contract (App. 016).

The Decision of the Board

Two members of a three-member panel of the Board (Chairman McCulloch and Member Jenkins) adopted the Trial Examiner's conclusion, "but for a somewhat different reason," namely that "in insisting upon separate negotiations with respect to Weld County contracts, the Respondent Company exercised a prerogative established by past practice, and did not, therefore refuse to bargain in violation of Section 8(a)(5) . . ." (App. 022). Member Zagoria dissented, pointing out that neither Employer's "secret mental reservations on the authority granted to NECA" or the willingness of the Union on past occasions to bargain for separate wage and benefit schedules constituted notice to the Union that NECA's authority to bargain was in any way restricted or justified Employer's refusal to honor an agreement negotiated by its duly designated bargaining representative, NECA (App. 026).

SUMMARY OF ARGUMENT

I

Employer's withdrawal from the multi-employer unit was an "untimely withdrawal" under many decisions of both the Board and the Courts and Employer is therefore bound by the Contract negotiated in its behalf by the representatives of the multi-employer group.

II

The Board's conclusion that Employer had a prerogative established by past practice for insisting upon separate negotiations with respect to Weld County contracts is not supported by its findings of fact or by substantial evidence in the record, and misconstrues the principles affirmed by this Court in the *Kroger Company*, 141 NLRB 564, *Retail Clerks Union No. 1550 v. NLRB* 117 App. Dec. 191, 330 Fed. 2d, 210 (1964).

III

If the Board's conclusion is based on findings that the Union had denied Employer an opportunity to participate in negotiations or that the Union's conduct constituted a breach of faith so as to excuse Employer's failure to sign the contract, such a conclusion is not supported by findings of fact or by substantial evidence in the record.

IV

The Board erred in permitting one member of a multi-employer bargaining group to make an untimely withdrawal from the group and to renounce a contract negotiated on its behalf by the group solely because of dissatisfaction with the conduct of its representative and the results of the negotiations.

V

The Board's failure to follow its previous decision on the issue of untimely withdrawals from a multi-employer bargaining unit is arbitrary and capricious and undermines the stability of multi-employer bargaining.

VI

The Board's decision in the case on grounds other than those upon which it was tried is arbitrary and capricious.

ARGUMENT

I. Employer's withdrawal from the multi-employer unit was an "untimely withdrawal" under many decisions of both the Board and the Courts and Employer is therefore bound by the contract negotiated on its behalf by the representatives of the multi-employer group.

The principle that neither an employer nor a union will be permitted to withdraw from a multi-employer bargaining group except upon a clear and unequivocal notice, communicated to the other party prior to the time negotiations have commenced is firmly established in decisions of the Courts and of the Board. *Retail Associates* 120 NLRB 388 (1968). *NLRB v. Sheridan Creations* (2nd Cir) 357 Fed. 2d 245 cert. den. 385 U.S. 1005 (1966); *NLRB v. Paskesz* (2nd Cir) 405 Fed. 2d 1201 (1969); *NLRB v. John J. Corbett Press, Inc.* (2nd Cir) 401 Fed. 2d 673 (1968); *NLRB v. Dover Tavern Owner's Ass'n.* (3rd Cir) 412 Fed. 2d 725 (1969); *Newspaper Publishers v. NLRB* (6th Cir) 372 Fed. 2d 569 (1967); *Universal Insulation Corp. v. NLRB* (6th Cir) 361 Fed. 2d 406 cert. den. 385 U.S. 936 (1966); *NLRB v. Strong* (9th Cir) 386 Fed. 2d 929 (1967) reversed in *NLRB v. Strong* 393 U.S. 357 (1969) only insofar as the Circuit Court refused to affirm the Board's order to pay fringe benefits; *NLRB v. Southwestern Colorado Contractors Association* (10th Cir) 379 Fed. 2d 360 (1967); *NLRB v. Tulsa Sheet Metal Works, Inc.* (10th Cir) 367 Fed. 2d 55 (1966).

There is no dispute in this case that Employer's notice both to NECA and to the Union was given long after negotiations for the 1968 contract had commenced and, in fact, the only notice given by Employer to the Union was more than 2 months after the contract had been consummated. It is therefore clear that under the normal rule

applied by the Board and confirmed by the Courts, Employer's attempted withdrawal from the unit was ineffective; he was bound by the 1968 Agreement negotiated on his behalf by NECA and the Board would normally order him to sign the contract and to apply its terms retroactive to the date of its execution, February 7, 1968.

II. The Board's conclusion that Employer had a prerogative established by past practice for insisting upon separate negotiations with respect to Weld County contracts is not supported by its findings of fact or by substantial evidence in the record, and misconstrues the principles set out by the Board and this Court in The Kroger Company, 141 NLRB 564; Retail Clerks Union Local 1550, v. NLRB, 117 App. Dec. 191, 330 Fed. 2d 210 (1964).

As pointed out below, the Board's decision in this case departs both from the basis asserted by the Employer in the hearings and from the basis relied upon by the Trial Examiner. The Board's ultimate decision appears to rest on conclusions (1) that the Employer refused to sign the contract because there were no separate negotiations with it concerning wage rates, and (2) that past practice had given Employer a prerogative to insist upon such separate negotiations. Neither of these conclusions are supported by the Board's findings of fact or by substantial evidence in the record.

On the first point the only independent findings of fact which the Board makes are that Employer "indicated they would not go along with the uniform wage proposals;" and that Employer on April 12, 1968 "stated that it intended to terminate its agreement with the Union, adding that it could not go along with the wage increases since it would be unable to compete with local non-union contractors."

The reason stated by Employer in its only notice to the Union is simply:

> "We feel that we cannot go along with this increase in wages and the proposed increase as of April 1, 1969, as our competition here in Greeley will not allow it" (G.C. Ex. 6, App. 326).

Both the Board's own findings and the undisputed evidence demonstrate that the real reason for Employer's refusal to sign the contract was not the absence of separate negotiations but its dissatisfaction with the results of the negotiations. We set forth under IV below the principles which we believe demonstrate that a refusal to sign the contract on this basis is clearly an unfair labor practice under sec. 8(a)(5) of the Act.

On the second point the Board's conclusion that Employer was justified in not signing the contract because it had a prerogative to insist upon separate negotiations is also not supported either by the Board's findings of fact or by the evidence in the record. The Board's findings of fact refer to the separate bargaining and separate contracts which had prevailed prior to the 1965 agreements and refer to the changes which were made by the parties beginning in 1965. The Board acknowledges the two written instruments executed on September 15, 1965 (G.C. Ex. 16, App. 265, G.C. Ex. 17, App. 264) which cancelled the old Weld County separate agreement and which made Employer a party to the Area Agreement. The Board further recites the Letter of Assent dated March 2, 1966 (G.C. Ex. 3, App. 329) and the Bargaining Authorization Agreement (G.C. Ex. 4, App. 328) (both quoted above) in which Employer agreed to be bound by the Area Agreement and all amendments thereto and designated NECA as its authorized bargaining agent. There is nothing in

either of these documents which in any way reserves to Employer the right to engage in separate negotiations or which restricts in any way the authority of NECA to bind the Employer in negotiating amendments to the Area Agreement. These documents on their face put an end to the past practice of the parties to reach separate agreements by separate bargaining, and commit Employer to bargaining under the Area Agreement through NECA.

In the face of these documents the Board's conclusion that Employer had reserved the right to separate negotiations could only rest on clear and convincing proof of an understanding between the parties that despite the terms of the documents Employer was not to be bound by agreements negotiated by its representative unless there were separate negotiations. Evidence tending to show only that this was Employer's intent does not supply such proof because the Union cannot be bound by an undisclosed intent which varies the terms of the written undertakings on which it has a right to rely. Consequently the Board's finding that ". . . on December 21, 1966 the Weld County contractors *told NECA* that they should have separate negotiations with the Union" (App. 022, emphasis supplied) proves nothing in the absence of a further finding that this intent was conveyed to and accepted by the Union — a finding which the Board did not, and on this record could not, make. The Board then recites the fact that in the agreement executed on October 16, 1967 "it was expressly stated that the amendments therein constituted changes that were jointly and *locally* negotiated" (App. 022, emphasis supplied). If the Board's reliance on this recital is intended to justify a conclusion that there were separate negotiations between the Union and Employer preceding the consummation of this contract then it is in complete conflict with the evidence. The evidence is undisputed that the last meeting between the Union and Employer was

on July 7, 1965 prior to the time Employer became a member of the area unit and subject to the area agreement. If the Board interprets this recital in the contract as proof that Employer's rates were discussed by its representative (NECA) and the Union then the finding is meaningless on the issue here because that kind of "separate negotiations" was also conducted between NECA and the Union in the 1968 negotiations leading to the contract which Employer now repudiates. The Board next recites that in the 1967 agreement "wage differentials for the Weld County contractors were retained and agreed to by the Union." (App. 022). This finding lends no support to the conclusion that the Union agreed that wage variances had to be separately negotiated with Employer. Here again the evidence is undisputed that there were no separate negotiations with Employer leading to the retention of the wage differentials in the 1967 negotiations — the only negotiations on such rates were between the Union and NECA. Moreover the 1968 negotiations resulting in the contract Employer now repudiates followed precisely the same formula — a wage differential (this time limited to contracts under $5,000) was retained in the contract and was negotiated, just as in 1967, between the Union and NECA without Employer's presence at any negotiating session. Finally the Board recites that Employer advised NECA in January 1968, prior to the execution of the new contract that it "would not go along with the proposed uniform wage proposals" (App. 022). Here again this fact lends no support whatever to the Board's conclusion that "the parties mutually understood that an individual variance . . . could be negotiated" by Employer (App. 022). Certainly this statement by Employer to its own representative cannot be construed to imply the Union's consent to individual negotiations.

On the record as a whole there is a complete lack of

evidence that the Union ever agreed that the rates for Weld County had to be established by individual bargaining with Employer and other Weld County contractors or that NECA's authority to act as Employer's representative did not include the right to negotiate wages. In fact the undisputed evidence leads to the opposite conclusion: Petitioner's position in all negotiations after 1965 was to eliminate the wage differential and although it never entirely succeeded, the differential was decreased in each subsequent contract; during each of these negotiations Employer was represented by NECA and did not meet in separate negotiations with the Union; at no time during any of the negotiations did either Employer or NECA advise the Union that NECA did not have the right to negotiate wages or that the negotiations were subject to Employer's right to meet separately or to disavow the results agreed to by its representatives. The past practice of the parties after Employer became a member of the larger multi-employer group, therefore, is completely consistent with the Union's position herein and contrary to the Board's conclusion.

The Board cites *The Kroger Company* 141 NLRB 564 (1963) in support of its decision. The decision in that case was affirmed by this Court in *Retail Clerks Union No. 1550* v. NLRB 117 App. Dec. 191, 330 Fed. 2d 210 (1964). The decision was that Kroger had "exercised a prerogative established by past practice" in refusing to sign a contract containing a pension plan. We respectfully submit that the rationale of the *Kroger* case simply will not fit the facts involved here. In the *Kroger* case there was no determination by the Board that Kroger was in fact a member of a multi-employer group bound to accept the results of its negotiations. The Board therefore found it unnecessary to determine whether Kroger's refusal to sign the contract was an untimely withdrawal and decided the

case solely on the issue of the Employer's good faith; in this case the issue of an untimely withdrawal is squarely presented by the Board's own finding that Employer was a member of the multi-employer group; in the *Kroger* case the practice was for the employers concerned in the loosely-knit group bargaining to sign individual contracts; here the practice has always been for NECA to sign and individual employer signatures were never required to make the contract binding. In the *Kroger* case there were no explicit delegations of authority from the employer to the group and therefore the issue of whether or not the employer had indicated an intent to be bound by group action had to be determined from the practice of the parties; here there is an express and explicit delegation of authority which not only terminated a previous past practice but which constitutes a written agreement to be bound which cannot be modified by any subsequent past practice or parol evidence without the clearest kind of proof. In the *Kroger* case there were 14 instances of individual bargaining concerning variations from the contract terms; here there is not a single instance of individual bargaining following Employer's written agreements to be bound by the joint negotiations; and finally in *Kroger* it is clear that the Union was on notice from the very beginning of the negotiations that Kroger had not authorized the association negotiators to bargain for it on pensions; here the Union not only had the right to rely on the unqualified written authorization given by the Employer to NECA to bargain on all issues but there was never any notice to the Union that Employer was in any way withdrawing or restricting the authorization until after the negotiations were completed.

III. If the Board's conclusion is based on findings that the Union had denied Employer an opportunity to participate in negotiations or engaged in any conduct constituting a breach of faith so as to excuse Employer's failure to sign the contract such a conclusion is not supported by findings of fact or substantial evidence in the record.

The Trial Examiner's decision is based essentially on a conclusion that NECA and the Union had denied to Employer "any meaningful opportunity to participate in the 1968 negotiations," that this amounted to a "breach of faith," and that the Board should therefore "stay its hand" (App. 016). The Board stated "We agree with the Trial Examiner's Conclusion, but for a somewhat different reason." (App. 021). This leaves it somewhat ambiguous as to whether the Board is relying on any "breach of faith" by the Union in arriving at its decision and makes it necessary to examine briefly the Union's conduct in this respect.

Following the 1965 negotiations and the execution of the Letter of Assent and Bargaining Authorization the Union's position in negotiation was perfectly straightforward and consistent. One of its objectives in the 1966-67 negotiations and in the 1967-68 negotiations was to eliminate the differential wage rates for Weld County. It also took a straightforward position at the very outset of the 1966 negotiations that there should be no separate negotiations with Weld County employers on this issue and that those employers should be present at the negotiations with the other employers subject to the Area Agreement. As early as December 15, 1966 it asked Employer's bargaining representative why the Weld County representatives weren't there and pointed out that "if they are interested they should be here." (App. 367). At no time after Employer became a member of the multi-employer unit did the Union

ever refuse to negotiate with Employer's designated representative, NECA, concerning Weld County rates. In fact that issue was discussed clearly in both the 1966-67 and the 1967-68 negotiations resulting in settlements in which the Union succeeded in lowering the differential rate but failed to eliminate it entirely (G.C. Ex. 18, App. 259, Resp. Ex. 16, App. 344). At no time during the negotiations was the Union advised either by NECA or Employer that negotiations on Weld County rates were subject to Employer's approval or that NECA was not authorized to negotiate those rates or to enter a binding agreement on them. The only statement even approaching such a reservation is the statement by NECA in the meeting of December 15, 1966 that "It is understood that Sections 6.18 (W) *would be considered* by the people in the areas covered by the same" (Resp. Ex. 10, App. 366, Emphasis supplied). This statement certainly does not set forth any reservation on NECA's authority to negotiate on the rates, particularly in view of the fact that NECA did thereafter discuss the rates with Employer and that an agreement was consummated without any separate negotiations between the Union and Employer. Moreover, at the time the statement was made the Union promptly replied saying, in effect, if these employers are interested then they should be here.

If there is any "breach of faith" disclosed in the record it is solely in the fact that NECA did not keep Employer fully informed during the 1967-68 negotiations, but if this be a "breach of faith" it cannot be attributed to the Union, and Employer's remedy, if any, should be in proceedings against the representative it chose and clothed with full authority to bargain for it.

IV. The Board erred in permitting one member of a multi-employer group to make an untimely withdrawal from the group and to renounce a contract negotiated on its behalf by the group solely because of dissatisfaction with the conduct of its representative and the results of the negotiations.

If there was no limitation on NECA's authority to bargain for Employer, properly conveyed, or assented to, by the Union, then the only basis for permitting Employer to renounce the contract and withdraw from the group is its dissatisfaction with the conduct of the negotiations and the results reached on the wage issue (which is the basis Employer himself asserts). The Trial Examiner recognized that such dissatisfaction does not provide a "lawful basis for renouncing the contract" (App. 016), and this principle has been consistently applied by the Board and the courts. In *NLRB v. Tulsa Sheet Metal Works, Inc.,* (10th Cir) 367 Fed. 2d 55 (1966) the court commented:

> "However, to allow withdrawal from the multi-employer bargaining unit because negotiations are apprehended by one of the group members to be progressing toward an agreement which would be economically burdensome insofar as it is concerned would be disruptive of the stability of the collective bargaining process."

See also *NLRB v. Paskesz,* (2nd Cir) 405 Fed. 2d 1201 (1969), *NLRB v. Dover Tavern Owners Ass'n.* (3rd Cir) 412 Fed. 2d 725 (1969), *Pomona Bldg. Materials,* 174 NLRB No. 193 (1969) where the association failed to respond to, or even refer to the Union, Employer's request for separate negotiations on unique conditions, *Johnson Sheet Metal,* 179 NLRB No. 104 (1969), where the

Employer was not permitted to withdraw even though he had been suspended from the association. *Intercity Petroleum Marketers, Inc.*, 173 NLRB No. 222 (1968) where the contract contained an illegal clause objected by the Employer, *Ray Hopman*, 174 NLRB No. 64 (1969) where the Employer alleged that the association had misrepresented to him his right to withdraw, *Homer Gale*, 176 NLRB No. 147 (1969).

V. The Board's failure to follow its previous decisions on the issue of untimely withdrawal from a multi-employer unit is arbitrary and capricious and undermines the stability of multi-employer bargaining.

The rule that a withdrawal must be unequivocal, communicated to the other party, and be made before negotiations commenced has its basis both in the necessity of preserving stability in multi-employer bargaining relationships and in the principle that neither party should be permitted to enjoy the benefits of such bargaining without assuming its responsibilities. Both principles are violated in the Board's decision here. Employer is permitted to withdraw after negotiations have been completed and an agreement has been reached despite the fact that Employer itself sought representation by the group so that it would no longer be considered an "outsider" under the area agreement practices and could enjoy broadened work opportunities and a widened labor market (G.C. Ex. 18, App. 259-263).

Multi-employer bargaining is favored in the furtherance of an important public purpose and the courts have cautioned against the danger that permitting easy withdrawal will destroy its meaning and the accomplishment of its purpose. *Newspaper Publishers v. NLRB*, (6th Cir) 372 Fed. 2d 569 (1967).

Here the Board has permitted an untimely withdrawal in

the face of an unequivocal bargaining authorization, without notice to the Union, and after a contract has been negotiated. The only justification for this result appearing in the record is the conduct of Employer's bargaining representative (NECA) in not keeping Employer properly informed. The effect of the decision in this case is to require the Board to examine the relationship between Employers and their designated bargaining agent and to set aside contracts whenever the Board determines that the bargaining agent has not fairly represented its principals. If this becomes the law then no Union is safe in entering into bargaining with an Employer association and it may not rely upon written unequivocal authorizations from individual employers because its contracts will be subject to being set aside by conduct of the association toward its members over which the Union has neither any responsibility or control. Moreover it invites employers to place undisclosed restrictions on their bargaining representatives so that in each negotiation the employer may seek the benefits of group bargaining without assuming its responsibilities. Such a result in this case in the face of well-established principles governing multi-employer bargaining relationships is arbitrary and capricious.

VI. The Board's decision in this case on grounds other than those on which it was tried is arbitrary and capricious.

This court in *Western Regional Council v. NLRB,* 125 App. Dec. 1, 315 Fed. 2d 934 (1968) expressed "concern that cases not be decided on grounds other than those on which they were tried." This observation would seem to be applicable here. Employer's defense to the complaint was primarily on the ground that it was not a member of the multi-employer bargaining unit. Both the Trial Examiner and the Board rejected that defense. The Trial Examiner

based her decision primarily on the ground that both NECA and the Union had been guilty of "bad faith" in their dealings with Employer. The Board appears to have rejected this theory and to have based its decision primarily on a conclusion that Employer by past practice had established a prerogative to engage in separate bargaining on wage rates. This departure by the Board from the issues as they were seen by the parties when the case was tried further emphasizes the tenuous nature of the Board's conclusions to reach a result inconsistent with its previously established principles. In doing so the Board has adopted different standards for similar situations and has acted arbitrarily in excess of its powers. *NLRB v. Mall Tool Co.* (7th Cir) 119 Fed. 2d 700 (1941), *Mary Carter Paint Co. v. Federal Trade Commission* (5th Cir) 333 Fed. 2d 654 (1964).

CONCLUSION

In conclusion we respectfully submit that the Board's decision is inconsistent with its previously established principles, opens the door for the destruction of multi-employer bargaining, and grants to Employer here an exemption from his bargaining responsibilities under sec. 8(a)(5) of the Act which has not been extended to other parties in similar

situations and which sanctions a violation of that section. The Board's decision is not supported by the evidence and is contrary to the law. It should be reversed and the case remanded to the Board for the entry of an appropriate remedy.

Respectfully submitted,

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APPENDIX

178 NLRB No. 108 D-2044
Greeley and Denver, Colo.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

K. JACOBSON & R. HABERMAN
d/b/a J-H ELECTRIC
and
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 68, AFL-CIO — Case 27-CA-2562

DECISION AND ORDER

On February 18, 1969, Trial Examiner Fannie M. Boyls issued her Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending dismissal of the complaint in its entirety, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel filed exceptions to the Trial Examiner's Decision together with a supporting brief, and the Respondent filed cross-exceptions to the Trial Examiner's Decision and a supporting and answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connections with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions,

cross-exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only insofar as they are consistent with the following.

The record shows that prior to 1965, the charging local represented employees working in the electrical contracting industry in some 21 counties in the northeast section of Colorado. This geographical area contained the counties of Weld and Larimer, which, until 1965, were covered by a separate collective-bargaining agreements from that which was applicable to some 19 other counties. Throughout the 21-county area, during this period of time, the employers covered by contracts with the Union were represented by the National Electrical Contractors Association.[1] The Respondent Company participated in such negotiations as a part of the Weld County bargaining committee, and abided by the contract covering Weld County.

On June 16, 1965, the Weld County contractors and the Union commenced negotiations for a new contract. The parties discussed the question of whether the Weld County agreement should be continued, or whether exceptions to the broad area agreement should be executed.[2] On July 27, 1965, NECA advised the Union that the Weld County contractors had adopted the Union's proposal to include Weld County in the area agreement, except for certain clauses, among which was the retention of the same wage rates enumerated in the old Weld County agreement. Thereafter, on September 15, 1965, the NECA and the Union signed two agreements. In the first, entitled "Cancellation Agreement", NECA and the Union agreed that as of October 1, 1965, the current Weld County agreement would be null and void and that the terms and conditions of

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[1]Hereinafter referred to as the NECA.

[2]Prior to this meeting, NECA and the Union had discussed modifications of the Weld County agreement.

employment in the Weld County geographical area would thenceforth be covered by the area agreement between the parties dated November 23, 1959 (the Denver agreement, as amended). The other agreement, entitled "Agreement Covering Weld County, Colorado," provided, *inter alia,* that the current agreement was to be null and void as of October 1, 1965, made provision for adding Weld County to the provision relating to the "Normal Construction Labor Market," but also made provision for specified wage rates for workmen in the Weld County area, and excluded Weld County from the new provision for contributions to a health benefit account. These provisions were incorporated into the area agreement, and referred to as the Red Book Agreement, or the April 1, 1965 agreement.

On March 2, 1966, the Respondent Company executed a Letter of Assent, which bound it to the area agreement and reaffirmed the bargaining authority of NECA. On March 17, 1966, the Respondent executed, in favor of NECA, a "Bargaining Authorization Agreement," whereby it authorized NECA to act as its bargaining Agent and to negotiate with the Union on its behalf. Pursuant to the 1965 Red Book Agreement, referred to above, the NECA and the Union met, on December 15, 1966, for the purpose of discussing proposed changes. The record reflects, however, that the Weld County contractors not only did not participate in these discussions; they formally voted to withdraw the notice to the Union of desire to renegotiate contract changes with respect to the wage provisions for Weld and Larimer Counties and this limitation was communicated to the Union in writing by NECA. On December 21, 1966, NECA representative John Hecht met with Larimer[3] and Weld County contractors, at which time the contractors again took the position that they should have

[3]The Larimer County contractors, like the Weld County contractors, were not covered by the broad area agreement.

separate negotiations with the Union. In January 1967, these contractors agreed to grant the hourly rate *increases* negotiated by NECA, thereby retaining existing differentials between their rates and those in the 19 counties. On October 16, 1967, the NECA and the Union executed an agreement, effective April 1, 1967, purporting to be "amendments" to the April 1, 1965 agreement, which provided, *inter alia*, that "The amendments herein contained constitute such changes as were jointly and locally negotiated." Special lower wage rates resulted for Weld and Larimer Counties.

Since the 1967 agreement between the NECA and the Union was due to expire April 1, 1968, the parties, in November 1967, entered into new negotiations. On November 29, 1967, the Union advised NECA that uniform wage rates should prevail throughout the entire 21-county area. By letter dated December 1, 1967, NECA agreed in principle, but the record reflects that the Respondent Company was not informed of these proposals. On January 11, 1968, NECA and the Union agreed on a common wage scale for all 21 counties, with lower wage rates prevailing for Larimer and Weld Counties for contracts under $5,000. Also, in January, NECA informed the Weld County contractors of these negotiations. The record shows, however, that some contractors, including the Respondent Company, indicated that they would not go along with the uniform wage proposals. On February 6, 1968, the NECA submitted to all its members, including the Respondent Company, a bulletin, showing, *inter alia*, new wage rates, and on February 7, 1968, NECA and the Union signed a 13-page document, setting forth all the amendments to the 1967 contract which the parties had agreed upon, and which were to remain in effect until April 1, 1970. On March 27, 1968, the Respondent Company advised the NECA that it would not go along with wage increases proposed for

the Weld County contractors. By letter dated April 9, 1968, the Union advised the Respondent Company that it was insisting on the Respondent's compliance with the terms and provisions of the current agreement. In response thereto, the Respondent Company, on April 12, 1968, stated that it intended to terminate its agreement with the Union, adding that it could not go along with the wage increases since it would be unable to compete with local nonunion contractors.[4] On the same day, the Respondent Company asked NECA to withdraw its name from NECA's negotiating list. The instant charges were filed on August 14, 1968.

The General Counsel contends that the Respondent violated Section 8(a)(5) of the Act by refusing to sign, or abide by, the jointly-negotiated collective-bargaining agreement. The Trial Examiner recommended that the complaint be dismissed primarily on the basis that the joint action of the NECA and the Union in this case, in not according the Respondent any meaningful opportunity to participate in the 1968 negotiations, amounted to a "breach of faith", and, under such circumstances, concluded that the Board should "stay its hand" in this proceeding. We agree with the Trial Examiner's conclusion, but for a somewhat different reason.

The fundamental question here is whether the Union contemplated, in the negotiations leading to the 1968 contract, that the agreement reached in joint bargaining sessions would be binding on all area employers in the NECA, contrary to the past practice for Weld County, or whether it was contemplated that an individual variance would again be negotiated with respect to the Respondent Company, as well as the other Weld County contractors. A careful review of the record convinces us that the Union

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[4]The Respondent Company also advised the Union that there were 17 nonunion contractors, and only 3 union contractors, in Greeley, Colorado.

had no reason to believe that Respondent Company intended to abandon its prior practice of bargaining separately with the Union regarding wage rates in Weld County. Rather, on December 21, 1966, the Weld County contractors told the NECA that they should have separate negotiations with the Union; and in the agreement executed by NECA and the Union on October 16, 1967, it was expressly stated that the amendments therein constituted changes that were jointly and locally negotiated, and wage differentials for the Weld County contractors were retained and agreed to by the Union. Moreover, in January 1968, prior to the execution of the new contract, the Respondent Company, and other Weld County contractors, advised NECA that they would not go along with the proposed uniform wage proposals. Under these circumstances, we conclude that the parties mutually understood that an individual variance in the multi-employer bargaining agreement could be negotiated by the Respondent Company and other Weld County contractors.

Accordingly, in refusing to execute, and abide by, the February 7, 1968, contract, and in insisting upon separate negotiations with respect to Weld County contracts, the Respondent Company exercised a prerogative established by past practice, and did not, therefore, refuse to bargain in violation of Section 8(a)(5) and (1) of the Act.[5] Accordingly, we shall dismiss the complaint.

ORDER

Pursuant to the provisions of Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders

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[5]*The Kroger Company*, 141 NLRB 564.

that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated, Washington, D.C. Sept. 29, 1969

Frank W. McCulloch, Chairman
Howard Jenkins, Jr., Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

Member Zagoria, dissenting:

I am constrained to disagree with the finding of my colleagues that the 8(a)(5) and (1) charge herein should be dismissed on grounds that the parties to the multi-employer negotiations contemplated, as evinced by past practice, that the Respondent was entitled to negotiate separate wage rates or other economic benefits which varied from those established by bargaining and agreement between NECA and the Union in multi-employer negotiations.

On December 15, 1965, the Respondent and other Weld County electrical contractors executed a cancellation of their separate bargaining agreement with the Union, and simultaneously approved a second written agreement whereby the terms and conditions of employment for their employees were established by the provisions of an areawide contract between the Union and NECA (hereinafter called the Denver agreement). Thereafter, on March 17, 1966, the Respondent executed and returned to NECA a "Bargaining Authorization Agreement," pursuant to which the Respondent authorized NECA to act as its bargaining representative with the Union, and which further provided that the authorization would remain in full force and effect until cancelled by the Respondent in accordance with the terms thereof. The authorization contains no reservations,

express or implied, which can be construed to impose any limitations on NECA as the Respondent's full authorized bargaining representative, and the Respondent makes no contention that it ever attempted to cancel or modify the authorization in accordance with the terms thereof, or otherwise. Similarly, the Respondent makes no contention that it otherwise made any attempt to effectuate a timely withdrawal, in whole or in part, from multi-employer negotiations. In summary, the Respondent gave full authorization to NECA to bargain on its behalf in multi-employer negotiations, the authorization was conveyed to the Union, and it remained in full force and effect at all times material to this proceeding.

On November 29, 1967, the Union served written notice on NECA of its intent to reopen the Denver agreement, scheduled to expire on April 1, 1968, and proposed, *inter alia,* that the special wage rates for contractors' employees in Weld and Larimer counties be eliminated, and that the parties agree to the substitution of a provision for uniform and substantially increased wage rates for the employees of all contractors covered by the agreement. In reply, on December 1, 1967, NECA advised the Union that renegotiation of the Denver agreement was desired, and NECA also proposed that the new contract establish uniformity of wages, benefits, classifications, and residential agreement applicability for the entire geographic jurisdiction covered by the agreement. When the Union and NECA met in a joint negotiating session on December 28, 1967, the Union proposed that the wage differentials applicable to the Weld and Larimer contractors be eliminated, except to the extent they would continue to apply on jobs where the total electrical cost was $5,000 or less. NECA tentatively agreed, and on January 11, 1968, after conducting research on the applicability of the $5,000 figure, NECA agreed to the Union's proposal, and this provision was incorporated

into the new Denver agreement executed by the Union and NECA on February 7, 1968. During the course of these negotiations, and before the new agreement was executed, Respondent and other Weld and Larimer County contractors were advised by a NECA representative that the Union was demanding single negotiations for all the contractors in the multi-employer association, and that the Union had also proposed that the wage rates negotiated for the Denver contractors would apply equally to the contractors in Weld and Larimer Counties. Although the record reveals that the Respondent voiced protest over this proposal to the NECA representative, there is no evidence in the record that the Respondent indicated to the Union its desire for separate negotiations on wages, or that it ever notified the Union that NECA's authority to bargain on the Respondent's behalf was in any way restricted.

The stability of the bargaining relationship requires that parties to multi-employer negotiations can abandon that relationship only by a timely and unequivocal notice of intent to withdraw. The Respondent makes no contention here that it complied with the standards established by the Board for a timely and effective withdrawal, but, on the contrary, and notwithstanding the unequivocal wording of the Bargaining Authorization agreement given to NECA, it contends that it retained the privilege of separate bargaining with the Union on wages and other economic benefits. The record fails to sustain the Respondent's contention. The Respondent's secret mental reservations on the authority granted to NECA, even if known to NECA, are not notice to the Union that NECA was bargaining on Respondent's behalf with less than full authorization. Lamentable as it may be that NECA failed to keep the Respondent apprised of meetings, proposals, and counterproposals during the 1967-68 negotiations, the alleged omissions of NECA are not attributable to the Union. As

to the pattern of past bargaining, the factor on which my colleagues so firmly rely, the mere willingness of the Union to bargain on past occasions with NECA for a separate wage and benefit schedule for the Respondent and other non-Denver contractors, is not evidence that the Union was on notice in the 1967-68 negotiations that NECA's authority to bargain and execute a whole agreement was in any way restricted. I would find that the Respondent violated Section 8(a)(5) and (1) of the Act, and I would require the Respondent to sign and retroactively apply the terms of the bargaining agreement entered into between the Union and NECA on February 7, 1968.

Dated, Washington, D.C. Sept. 29, 1969

Sam Zagoria, Member

NATIONAL LABOR RELATIONS BOARD

CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for the Petitioner herein, certifies that a copy of the foregoing Brief of Petitioner has been served upon each of the parties by causing the same to be deposited in the United States mail, postage prepaid, this 5th day of February, 1970, addressed as follows:

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No. 23,634

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 68, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Review of an Order of
The National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 68, AFL-CIO,

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Review of an Order of The National Labor Relations Board

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

COUNTERSTATEMENT OF ISSUE PRESENTED

Whether the Board properly concluded that K. Jacobson and R. Haberman, d/b/a J-H Electric, did not violate Section 8(a)(5) and (1) of the Act in refusing to execute and abide by the 1968 collective-bargaining agreement between Local 68, IBEW, and the National Electrical Contractors Association, and in insisting, in accordance with a prerogative established by past practice, upon separate negotiations with respect to Weld County contractors.

In accordance with Rule 8(d) of this Court's General Rules, the Board states that this case has not previously been before this Court.

COUNTERSTATEMENT OF THE CASE

This case is before the Court on petition of International Brotherhood of Electrical Workers, Local Union No. 68, AFL-CIO (hereinafter referred to as the "Union"), filed pursuant to Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*) to review an order of the National Labor Relations Board dismissing a complaint against K. Jacobson and R. Haberman, d/b/a J-H Electric (hereinafter referred to as the "Company"). The Board's Decision and Order (A. 18-23)[1] was issued on September 29, 1969, and is reported at 178 NLRB No. 108.

I. THE BOARD'S FINDINGS OF FACT

A. The bargaining history prior to 1965

The Company's place of business is at Greeley, Weld County, Colorado, where it is engaged in installing and servicing electrical equipment. Since it began operations in 1956, the Company has operated under a collective-bargaining agreement with the Union (A. 4; 62). Until 1965, the Company was covered by the Union's contracts covering Weld County. Both Kenneth Jacobson and Reuben Haberman of the Company regularly participated in

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[1] "A." references are to the pages of the printed Appendix filed herein. References preceding a semicolon are to the Board's findings; references following are to the supporting evidence.

these negotiations as part of the Weld County bargaining committee. John Hecht, as manager of the Rocky Mountain Chapter of the National Electrical Contractors Association, Inc.[2] (hereinafter referred to as "NECA"), assisted the contractors in the negotiations and signed the contracts negotiated (A. 3-4, 19; 81-82, 113-114, 186, 235-236). Hecht also helped the Denver area contractors to negotiate their agreements.[3] The Denver agreements (hereinafter referred to as the "Area Agreement") covered the 19 counties in and around Denver. The Weld and Larimer contracts, although separately negotiated and executed, tended to follow the Area Agreement except for the provisions relating to wages, health benefits, termination dates, and the "Normal Market Construction Area"[4] (A. 4; 84-86).

B. Negotiations in 1965 and 1966 resulting in the execution of a single contract for the twenty-one county area

In March of 1965, NECA was preparing for upcoming negotiations with the Union and sent a *Negotiations Bulletin* "To All Contractors' Signatory Weld County Agreement." The Bulletin urged the contractors to ratify several proposed amendments to that agreement (A. 5; 96, 290-297). Among the proposals were the following:

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[2] NECA is an industry-wide association of electrical contractors which represents its members and other consenting contractors in labor relations matters. Although the record does not indicate that the Company has ever been a member of NECA, the Company has, like most other employers under contractual relations with the Union, designated NECA to represent it in collective bargaining with the Union (A. 4; 81-82, 328, 330).

[3] Prior to 1965, Hecht assisted Larimer County contractors in negotiating their contract with the Union too. Thus, until 1966, the Union operated under three separate contracts in the 21-county area in northeast Colorado (A. 4; 84).

[4] Under the Davis-Bacon Act, the Normal Construction Labor Market is used by the Secretary of Labor to determine the minimum wage rate that can be paid to laborers and mechanics employed by contractors or subcontractors on federal contracts of more than $2,000 for the construction, alteration, or repair of public buildings or works (A. 5, n. 3).

GENERAL CONDITIONS:

A. Provided the following amendments are mutually agreed to by both parties, the Weld County Agreement as it now exists shall be cancelled and made null and void after April 1, 1965.

B. The Rocky Mountain Chapter will appoint a resident contractor of Weld County to act as advisor to the area Negotiating Committee.

Additionally, it was proposed that if the Weld County contractors went under the Area Agreement that contract should be amended to provide special lower wage rates for work performed in Weld County and to include the geographical area of Weld County as part of the Normal Construction Labor Market.

On April 1, 1965, before the Weld County contractors had voted on the proposals, NECA sent another bulletin advising them that the proposed amendments previously distributed were "*to be completely disregarded*" because at a special meeting on March 30 the Union had voted down the proposals (A. 5; 393-394). On April 26, 1965, however, the Company indicated its approval of the amendments proposed in the March 27 bulletin by signing the document and returning it to NECA as requested (A. 5; 290-297).

On May 17, 1965, the Union advised NECA of its desire to negotiate changes in the Weld County agreement. Among other things, the Union proposed changing the anniversary date of the Weld contract to coincide with that of the Area Agreement and increasing the Weld County wage rates (A. 5; 134, 387-390).

On May 28, 1965, NECA served its counter-proposals on the "Weld County Division" of the Union. Among the proposed changes were: a provision substituting the "Weld County Division of Local Union No. 68, IBEW" for "Local No. 68, IBEW" as a party to the contract; a provision establishing a combination Negotiating and Joint Conference Committee; and a provision that the "Weld County Division" of the Union should be the exclusive source of referrals of job applicants (A. 6; 135-136, 141-142, 385-386).

On June 16, 1965, the Union and the Weld County contractors commenced negotiations (A. 6; 259). The parties discussed, *inter alia*, whether the Weld County agreement should be continued or whether exceptions to the Area Agreement should be executed. The contractors favored adopting the Area Agreement and negotiating applicable exceptions to it so they could take advantage of the greater work opportunities offered by the Area Agreement while at the same time using their experienced Greeley employees (A. 6; 146-147, 261).[5] The Union too favored adopting the Area Agreement but, "due to instructions from the membership," was not in a position to make such a proposal. Following a caucus, the contractors proposed to "delete current agreement; adopt Area Agreement with the applicable exceptions." The Union then observed that the parties should be "realistic about the anniversary dates in the fact that if we went to the Area Agreement, we would have to adopt the same anniversary dates as contained in

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[5] Under the various agreements with the Union, a contractor doing work in an area other than that covered by his agreement with the Union was, in effect, allowed to bring only one of his employees with him. This severely limited the Weld County contractors from doing any work outside of the County as their experienced employees could not work on the job and, consequently, they were forced to man the job with hiring hall labor whose experience and productivity were unknown to them (A. 6-7; 308-309, 321).

the Area Agreement. It wouldn't be feasible for exceptions to the Area Agreement to be negotiated on one date and the bulk of the agreement to be negotiated on the other." Following another caucus, the contractors agreed to change the anniversary date to coincide with that of the Area Agreement and proposed that the parties "adopt the conditions of the [Denver] Area Agreement with such exceptions as are mutually agreeable." The contractors also proposed a 30-cent wage package (A. 6-7; 222, 262).

The next and last negotiation session between the Union and the Weld County contractors in 1965 was held on July 7. The Union reported that the membership had turned down the contractors' proposal but had voted to "accept Weld County into the Base agreement; accept 30-cents per hour wage increase effective immediately; contract to expire April 1, 1967." The contractors rejected this proposal and offered as a counterproposal to maintain the Weld County agreement with its current two-year status with an October 1 anniversary date and to increase wages 40 cents an hour in 10-cent increments every six months. They also proposed that the Weld County resident contractors not be considered "outside contractors" under the Denver agreement in order to enable their crews to have complete mobility anywhere within the Union's jurisdiction. The Union accused the contractors of a "complete turn-around" since the June 16 meeting, withdrew its last proposal, and reinstated its original May 17 proposals. Near the conclusion of the meeting, Haberman and Jacobson of the Company urged further consideration of the establishment of the "area Joint Conference and/or Negotiating Committee" as proposed by the contractors in their opening letter and stated they "felt that Weld County problems could be handled by Weld County people" (A. 7; 132-134, 148-149, 391-392).

On July 27, 1965, Hecht informed the Union that the Weld County contractors had accepted the Union's original proposal to include Weld County in the Area Agreement with the following exceptions: 1) the

section governing the number of foremen required on the job; 2) the section governing travel time within Weld County; and 3) the retention of the wage rates enumerated in the old Weld County agreement. Finally, Hecht advised the Union that the Weld County contractors "and/or their undersigned representative (NECA) are willing to meet with your committee and/or its representative at any such time as is reasonable and mutually agreeable to discuss" the exceptions mentioned above (A. 7; 257-258). The parties reached agreement on all issues but wages. That matter was finally resolved on August 20, 1965 by the Council on Industrial Relations as provided by the agreement[6] (A. 8; 128-129).

Thereafter, on September 15, 1965, the NECA and the Union signed two agreements to implement their understanding. In the first, entitled "Cancellation Agreement," NECA and the Union agreed that as of October 1, 1965, the current Weld County agreement would be null and void and that the terms and conditions of employment in the Weld County geographical area would thenceforth be covered by the Area Agreement (A. 8, 19; 94-95, 264). The second agreement, entitled "Agreement Covering Weld County, Colorado," provided for, *inter alia:* 1) cancellation of the Weld County agreement as of October 1, 1965; 2) the addition of Weld County to the section relating to the "Normal Construction Labor Market"; 3) a special lower wage rate scale for workmen in the Weld County area; and 4) the exclusion of Weld County contractors from the new provision for contributions to a health benefit account (A. 8, 19; 265-269). These provisions were incorporated into the Area Agreement and referred to as the Red Book Agreement or April 1, 1965 agreement (A. 8, 19; 85-86, 167-168, 307-313).[7]

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[6] The Council, composed of an equal number of management and labor representatives, sits on a national level to settle disputes between locals of the Union and chapters of NECA (A. 129).

[7] Similarly, separate provisions relating solely to Larimer County contractors were also incorporated in the Red Book Agreement of 1965 (A. 309-313).

On March 2, 1966, the Company executed a Letter of Assent which bound it to the Area Agreement and reaffirmed the bargaining authority of NECA (A. 8-9, 20; 84, 174, 329). On March 17, 1966, the Company executed a "Bargaining Authorization Agreement" authorizing NECA to act as its bargaining agent in negotiations with the Union (A. 9-10, 20; 100, 328).

C. 1966-1967 negotiations resulting in amendments to the Red Book Agreement

The first negotiations involving the new twenty-one county multiemployer unit began on November 29, 1966. The Union initiated the negotiations by proposing that the two wage rate schedules covering Weld and Larimer Counties be eliminated and that the hourly wage rate in all 21 counties covered by the Agreement be made uniform (A. 10; 157-159, 380-381, 383-384). In response, on December 1, 1966, NECA proposed wage increases for each of the three separate wage schedules provided in the 1965 agreement (A. 10; 155, 376, 378).

When negotiations commenced in Denver on December 15, 1966, the contractors' negotiating committee, consisting exclusively of Denver area contractors, stated that "it is understood that Sections 6.18(L) [setting forth Larimer County wage rates] and (W) [setting forth Weld County wage rates] would be considered by the people in the areas covered by same" (A. 10; 180-183, 364, 366). To this the Union replied:

> Why aren't representatives of the Larimer and Weld Counties' area here? We would like to make it clear that we do not intend to travel into their areas to have them negotiate parts of this agreement. We consider that all negotiating concerning this agreement are carried on in this location at this table. If they have any

> interest in these matters, this is where the action is, this is where the things will happen and we don't intend to sit around for hours negotiating small parts and pieces of this agreement to satisfy their particular situation. Our representatives are here. This is where the decisions are made concerning the entire jurisdiction and if they are interested they should be here (A. 10; 367).

On December 21, 1966, NECA Representative Hecht met with Larimer and Weld County contractors to discuss the progress of the Denver negotiations. Both Haberman and Reuben of the Company were present. The contractors noted that the Union's proposal made no reference to Sections 6.18(L) or 6.18(W), the separate wage rate schedules for Larimer and Weld Counties. Hecht then told them of the Union's inquiry about why no representatives from Weld and Larimer Counties were present at the December 15 negotiating session. These contractors took the position that they should have separate negotiations with the Union and unanimously approved the motion of Haberman to withdraw the December 1 wage increase proposals for Sections 6.18(L) and (W). The contractors agreed to meet again if and when the Union requested negotiations regarding those sections (A. 10, 20; 368-369). On December 27, 1966, Hecht, acting for and on behalf of Weld and Larimer County contractors, advised the Union of the contractors' decision to withdraw the December 1 wage proposal but assured the Union that these contractors "stand ready to meet and discuss" the matter. Copies of this letter went to all members of the contractors' negotiating committee (A. 11; 184-185, 363). The Weld and Larimer County contractors met with Hecht again on January 27, 1967. This time they agreed to go along with the hourly rate increase for Larimer County contractors negotiated by NECA, the amount to be added to the current scale set forth in Section 6.18(L) of the Red Book Agreement (A. 11, 20; 362).

As in 1965, the Union and NECA in 1967 were again unable to agree on a number of items, including the wage rate for Weld County, and these differences were submitted to the Council on Industrial Relations. The Council's decision, which was incorporated into the 1967 agreement, contained several provisions giving Weld County contractors special treatment, including a provision which required the Weld County contractors to grant greater wage increases than the other contractors for certain classifications of workers (A. 11; 191-192, 359-360). Nonetheless, the 1967 wage rates remained lower for Weld County contractors than those paid by other contractors, including Larimer County contractors, though Larimer County wage rates were lower than those in the remaining 19 counties covered by the agreement (A. 11, 298-300, 303-305). The changes agreed to by the parties and the Council's decision were incorporated into the Red Book Agreement of April 1, 1965 as "amendments." The opening sentence of the 1967 Amendments to the Red Book Agreement stated: "The amendments herein contained constitute such changes as were jointly and *locally negotiated* and those set forth in the Decision No. 1309 of the Council on Industrial Relations dated February 17, 1967" (emphasis added) (A. 11; 298). The Company did not, however, execute a Letter of Assent or a Bargaining Authorization Agreement as it had done following the 1965 agreement.

D. The 1967-1968 negotiations

On November 29, 1967, the Union opened negotiations for the 1968 contract. Once again it proposed the elimination of the three separate wage rate schedules as found in Sections 6.18(A), 6.18(L) and 6.18(W) and the substitution of one uniform and substantially increased wage rate to prevail throughout the entire 21-county area (A. 12, 20; 163-164, 370-372). In a letter dated December 1, 1967, NECA agreed in principle with the

Union's plan for a uniform wage scale and proposed, *inter alia*, to "change or delete" Sections 6.18(L) and 6.18(W) "in such manner, as may be jointly agreed, to establish wage scales, classifications and job size limits as will best establish a uniformity of wages, benefits, classifications, and Residential agreement applicability to the entire geographical jurisdiction covered by this agreement" (A. 12, 20; 161-162, 374-375). Neither the Company nor any other Weld County contractor was informed of these proposals (A. 12, 20; 242).

In the first negotiating session on December 28, 1967, the Union proposed one wage scale for all contractors in the 21-county area with lower wage rates prevailing in Larimer and Weld Counties for contracts under $5,000. The contractors' negotiating committee, again consisting exclusively of Denver area representatives, agreed to consider the proposal (A. 12; 253-254, 256). Before the next negotiating meeting, NECA Representative Hecht went to Greeley, in Weld County, and to Fort Collins, in Larimer County, to investigate the building permits in order to determine the propriety of the $5,000 figure. Although he was in the area, Hecht made no attempt to consult with the Company or any of the other Weld County contractors to be affected by the wage negotiations. Hecht's investigation revealed that a high percentage of the total number of building permits in those counties were for work under $5,000 in cost (A. 12; 209-211, 242). At the January 11, 1968 negotiating session, NECA and the Union tentatively agreed on a common wage scale for all 21 counties, with lower rates prevailing for Larimer and Weld County for contracts under $5,000 (A. 12; 344-345, 349-350).

Sometime in late January, Hecht met with the Weld County contractors and discussed the Denver negotiations.[8] He told them that the Union was refusing to bargain with NECA for Weld and Larimer Counties as separate groups but did not inform them of the $5,000 wage differential. Some of the contractors, including the Company, indicated they would not go along with the uniform wage proposals (A. 13, 20-21; 64-67).

On February 6, 1968 NECA sent to all its members, including the Company, a bulletin entitled "Watts-What" containing changes and additions to the 1967 contract. The Bulletin informed the contractors that the amendments had been approved by both the Union and NECA and that, after approval by the national offices of each of the signatory parties, the new contract would be printed and distributed (A. 13, 21; 213-214, 341-343). This was the Company's first knowledge of the results of the Denver negotiations (A. 13; 67-70).

On February 7, 1968 NECA and the Union signed a 13-page document which set forth all the amendments to the 1967 contract, including a section providing for a uniform wage scale for all 21 counties covered by the agreement[9] (A. 13, 21; 277, 280-281, 286-289). By its terms, the contract was to remain in effect until April 1, 1970 and to continue in

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[8] The exact date of these meetings does not appear in the record. Based on Haberman's testimony that NECA and the Union had not yet reached a final agreement at the time Hecht held these meetings, the Trial Examiner found that the meetings must have been before the end of January (A. 13, n. 7). The minutes of the Joint Negotiations Committee Meeting of January 11, 1968, indicate that both NECA and the Union had agreed to eliminate the three wage schedules and adopt one uniform wage scale for work performed on jobs over a certain dollar amount. The specific dollar amount and the wage scale were left for further study (A. 349-350).

[9] After approval by both national offices, the 1968 amendments were incorporated into the 1965 Red Book Agreement, as amended in 1967, and printed in a green-covered booklet (A. 297A).

effect from year to year thereafter unless changed or terminated by either party 120 days before any anniversary date.

On March 27, 1968, five days before the new contract was to become effective, the Company advised the Union it had not been notified of the meetings at which the wage increases had been negotiated and that it could not go along with the wage increases proposed for the Weld County contractors (A. 13, 21; 57-59, 228-230). By letter dated April 9, 1968, the Union informed the Company that it was insisting on the Company's compliance with terms and provisions of the new agreement (A. 13, 21; 327). On April 12, 1968, the Company wrote the Union that it intended to terminate the agreement at the earliest possible date as the new wage provision rendered the Company unable to compete with local nonunion contractors[10] (A. 13, 21; 326). On the same day the Company requested NECA to withdraw its name from NECA's negotiating list (A. 13, 21; 325). Since April 1, 1968, the Company has failed to abide by the wage and benefit terms of the contract (A. 13).

II. THE BOARD'S CONCLUSION AND ORDER

On these facts, the Board concluded that the bargaining history of the parties demonstrated that "the parties mutually understood that an individual variance in the multiemployer bargaining agreement could be negotiated by the Respondent Company and other Weld County contractors" (A. 22).[11] Consequently, the Company's refusal to abide by the

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[10] The Company also advised the Union that of the 20 licensed contractors in the Greeley area, only three were union contractors.

[11] The Trial Examiner had recommended the complaint be dismissed primarily on the basis that the joint actions of the Union and NECA in denying the Company any meaningful opportunity to participate in the 1968 negotiations amounted to a "breach of faith" and, therefore, the Board should "stay its hand in this case" (A. 16).

1968 contract and its insistence upon separate wage negotiations with respect to Weld County was merely the exercise of a prerogative established by past practice and not a refusal to bargain in violation of Section 8(a)(5) and (1) of the Act. Accordingly, the Board dismissed the complaint.[12]

ARGUMENT

THE BOARD PROPERLY CONCLUDED THAT THE COMPANY DID NOT VIOLATE SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO EXECUTE AND ABIDE BY THE 1968 AGREEMENT AND BY INSISTING UPON SEPARATE NEGOTIATIONS

A. The Board's findings

Contrary to the Union's contention (Br. 13-14, 23-24), the Board did not find that the Company executed a timely withdrawal from NECA so as to avoid the Local 68-NECA agreement where applicable – that is, with respect to matters which had not been treated separately in the past. Nor did the Board find, as the Trial Examiner did, that NECA and the Union had denied the Company an opportunity to participate in negotiations and therefore, that the Board should "stay its hand" and dismiss the complaint (see Union Br. 20-21). Rather, while agreeing with the Trial Examiner's conclusion that the complaint be dismissed, the Board found that in refusing to execute and abide by the 1968 contract and in insisting upon separate Weld County negotiations the Company was exercising a "prerogative

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[12] Member Zagoria dissented. In his view, the "Bargaining Authorization Agreement" the Company executed in favor of NECA in 1966 gave full authorization to NECA to bargain on the Company's behalf in multiemployer negotiations, and that if NECA failed to keep the Company apprised of proposals during the 1968 negotiations, the omission was not attributable to the Union. Member Zagoria found the pattern of past bargaining, relied on by the majority, could not be said to constitute notice to the Union that in the 1967-1968 negotiations NECA's bargaining authority was in any way restricted (A. 24-26).

established by past practice" and, therefore, did not violate Section 8(a)(5) and (1) of the Act.

This Court in *Retail Clerks Union Local 1550 v. N.L.R.B.*, 117 App. D.C. 336, 330 F.2d 210 (1964), accepted the Board's ruling in *The Kroger Company*, 141 NLRB 564 (1963), that it is consistent with multiemployer bargaining for an employer to exercise "a prerogative established by past practice" by insisting that specific mandatory subjects be treated on an individual employer basis.[13] Thus, this Court held (117 App. D.C. at 342, 330 F.2d at 216) that the individual employer may lawfully bargain independently of the multiemployer group on a particular issue if the group bargaining arrangement, over a period of time, evidences "such a mélange of group and individual negotiation and agreement . . . as to suggest a commonly accepted flexibility in the format of bargaining which would not automatically outlaw every departure from the fold . . . ".

Furthermore, the Court emphasized that multiemployer bargaining "is non-statutory in character, and thus lacks the definiteness in terms of nature and obligation which it might have if Congress had dealt expressly with it. The facts, always important, become more so when the relevant legal concept is blurred . . . ." 117 App. D.C. at 338, 330 F.2d at 212. Similarly, the Supreme Court in *N.L.R.B. v. Truck Drivers Union 449*, 353

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[13] Of course, it is well settled that multiemployer bargaining "does not preclude demand for specialized treatment of special problems." *Genesco, Inc. v. Joint Council 13, United Shoe Workers of America*, 341 F.2d 482, 489 (C.A. 2, 1965). Consequently, separate negotiations resulting in individual variances from the multiemployer agreement have long been recognized as consistent with multiemployer bargaining. *Retail Clerks Union No. 1550, supra*, 117 U.S. App. D.C. at 342, 330 F.2d at 216; *The Kroger Co.*, 148 NLRB 569, 573 and n. 6 (1964); *J. & H. Food, Inc.*, 139 NLRB 1398, 1404-1405 (1962); *Safeway Stores, Inc.*, 98 NLRB 528, 529 (1952); *Furniture Employers' Council of Southern California*, 96 NLRB 1002, 1004 (1951).

U.S. 87 (1957) recognized the amorphous character of multiemployer dealings and the deference to be given to the Board's factual determinations in dealing with it when the Court said, "the compelling conclusion is that Congress [by failing to expressly sanction multiemployer units] . . . 'intended to leave to the Board's specialized judgment the inevitable questions concerning multiemployer bargaining bound to arise in the future.'" *Id.* at 96. Cf. *N.L.R.B. v. United Insurance Co.*, 390 U.S. 254, 260 (1968). Accordingly, we turn to the facts as found by the Board.

The issue here, as stated in *Retail Clerks Union No. 1550, supra,* is "whether the group bargaining arrangements involved . . . were understood by the participants in them as operating to require contract uniformity under all circumstances." *Id.* at 117 App. D.C. at 339, 330 F.2d at 213. An examination of the bargaining history of the Union and NECA plainly demonstrates that, as the Board found, "the parties mutually understood that an individual variance in the multiemployer bargaining agreement could be negotiated by Company and other Weld County contractors" (A. 22).[14]

From 1956 to 1965 the Company and Union enjoyed an unbroken record of harmonious and successful bargaining. During this period they negotiated and executed separate contracts applicable solely to Weld County. Both Reuben Haberman and Kenneth Jacobson of the Company served on the employers' negotiating committee and were active participants in the bargaining. Although the Weld County Agreement tended to follow patterns

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[14] The importance of the bargaining history was underlined in *N.L.R.B. v. Miller Brewing Co.*, 408 F.2d 12, 15 (C.A. 9, 1969), where the court said, "Past conduct by members [of the multiemployer unit] is significant because these problems are solved on a case by case basis; an analysis of 'accepted flexibility in the format of bargaining' helps to reveal whether a practice that is not intrinsically unacceptable – individual negotiation – will be denominated an unfair labor practice."

in the Area Agreement, the Denver negotiations and agreement were in no way determinative of the conditions relating to the Weld County contractors. Thus, in addition to different anniversary dates, the Weld County Agreement deviated substantially from the Area Agreement on wages and economic benefits.

In 1965 consideration was given to the question of whether the results of the Weld County negotiations should continue to be recorded in a separate agreement or whether they should be incorporated as exceptions to the Area Agreement. At no time in 1965 or thereafter, however, was there any discussion or agreement to eliminate all Weld County negotiations in the future. The closest the Company ever came to such a position is found in its acceptance of the March 27, 1965 proposal of NECA to the Weld County contractors. At that time, NECA proposed that the Weld County agreement be cancelled and that Weld County be included in the Area Agreement if the parties mutually agreed to give Weld County contractors special treatment in several areas, including lower wage rates. Additionally, NECA proposed appointing "a resident contractor of Weld County to act as advisor to the area Negotiating Committee." Thus, the Weld County contractors never agreed to turn over complete control of their bargaining to the Denver-area contractors without retaining some voice in the matter.

After considerable haggling, the question was finally resolved on July 27, 1965, when NECA advised the Union that the Weld County contractors had adopted the Union's original proposal to include Weld County in the Area Agreement except for certain enumerated exceptions, including the crucial issue of wages, which were left for individual negotiation. The two agreements implementing this understanding plainly establish that, although in the future there would be only one bargaining agreement for the 21-county area formerly governed by three contracts, the parties contemplated separate negotiations for Weld County contractors on wage rates and other

economic issues and that the agreements reached in these negotiations were to be incorporated into the Area Agreement as "exceptions." The first of these two agreements cancelled the Weld County agreement and provided that terms and conditions of employment in the Weld County geographical area would thenceforth be covered by the Area Agreement "with all amendments thereto." The Union and NECA then executed a second agreement which amended provisions of the Area Agreement. Significantly, this agreement was entitled "*Agreement Covering Weld County, Colorado*" (emphasis added). Moreover, a review of the substance of those amendments (A. 8; 265-269) reveals that each pertained specifically and with one exception solely to Weld County. One exempted contractors working in Larimer and Weld Counties from contributing to the employees' Health Benefit Account, another added Weld County to the contract's definition of the Normal Construction Labor Market, a third defined the Weld County "metro" zone for travel expenses purposes, and two of the new amendments created a special lower wage scale for journeymen and apprentices working in Weld County. These variances from the Area Agreement establish separate dealing between the Weld County contractors and the Union and "justified the Board in deciding that there was no misunderstanding by the parties that all negotiating discussions would be confined to group sessions and that all contracts would be the same." *Retail Clerks Union, No. 1550, supra,* 117 App. D.C. at 340, 330 F.2d at 214.

Finally, the Letter of Assent and the Bargaining Authorization Agreement executed by the Company in March of 1966 are additional evidence that the parties contemplated separate wage negotiations for Weld County after the decision to do away with separate agreements for Weld County. With the exception of the dates and a reference to "(Weld County)" in the opening paragraph, the Letter of Assent executed by the Company on March 12, 1966, is identical to the one it signed following the Weld County

negotiations for 1963. And like the 1963 letter, the 1966 Letter of Assent bound the Company to an agreement negotiated by the Weld County contractors which contained a wage rate schedule substantially lower than that pertaining in the Denver area. The timing of the execution of these documents is critical. Both were executed shortly *after* the Weld County contractors agreed to be covered by the Area Agreement and *after* they had negotiated the applicable exceptions including wages to it. Nothing in the language of either of the agreements or in the circumstances leading up to their execution suggests that the parties intended to depart from the unbroken history of separate negotiations for Weld County contractors on wage rates and economic issues.[15]

The first attempt to dispense with separate negotiations for Weld County wages occurred at the commencement of the 1967 Denver negotiations when the Union proposed eliminating the three wage scales contained in the 1965 agreement and adopting one uniform wage scale for the entire 21-county area (*supra*, pp. 8-9). But the contractors' negotiating committee, composed entirely of Denver area contractors, refused to discuss the wage rates applicable to Larimer and Weld Counties since "[I]t is understood that Sections 6.18(L) and (W) [the Sections of the 1965 Red Book Agreement pertaining to the wage rates in Larimer and Weld Counties, respectively] would be considered by the people in the areas covered by the same." In response, the Union demanded:

> "Why aren't representatives of the Larimer and Weld Counties' area here? . . . If they have any interest in these matters, this is where the action is . . . . This

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[15] For the importance of the bargaining history and past practices in the interpretation of labor agreements, see Summers, *Collective Agreements and the Law of Contracts*, 78 Yale L. J. 525, 548-550 (1969).

> is where the decisions are made concerning the entire jurisdiction [the 21-county area] and if they are interested they should be here.

This response clearly demonstrates that the Union, as well as the Denver contractors, considered the Weld County wage rate a matter to be negotiated with the Weld County contractors. The Union's only objection was that it wanted to do "all negotiating concerning this agreement" at one time and one place and that it could not do this without the Weld County contractors. The matter *was* handled separately. Thus, when Hecht informed the Weld County contractors of the Union's uniform wage proposal, the contractors promptly instructed Hecht to withdraw from NECA's proposals to increase the wage scale to be paid by Weld County contractors. Accordingly, Hecht formally notified the Union on December 27, 1966 that "The Rocky Mountain Chapter, NECA, acting for and in behalf of the Electrical Contractors who maintain their places of business in Weld and Larimer Counties . . . withdraw the proposals as pertain to Sections 6.18(L), 6.18(W); 7.03(L) and 7.03(W) [the latter two sections were concerned with travel time] . . . ." Hecht concluded by assuring the Union that the Weld County contractors stood "ready to meet and discuss" these matters. Thus, the Union was clearly informed that the Weld County contractors were directing the negotiations for those sections of the Area Agreement specifically reserved for them as a result of the 1965 negotiations. Furthermore, the Union was plainly advised that Weld County wages could be negotiated upon request.

The Area Agreement finally reached in 1967, like the 1965 Agreement, contained a separate lower wage scale for Weld County and is unmistakable evidence that, although a uniform wage may have been the Union's objective, there was "a commonly accepted flexibility in the format of bargaining" permitting locally negotiated wage differentials. *Retail Clerks Union,*

No. 1550, supra, 330 F.2d at 216, 117 U.S. App. D.C. at 342. Finally, the opening sentence of the 1967 agreement expressly acknowledged that the amendments constituted such changes as were jointly and "locally" negotiated (*supra,* p. 10). The Union and NECA thereby in effect recognized the position of the Company and other Weld County contractors that the exceptions to the Area Agreement which embodied the wage rates and economic items affecting Weld County contractors must be negotiated on a local basis.

In the light of this bargaining history, "the assumptions common to [all] must have been that, although brought together by a joint interest in uniformity, [none] marched as latter-day musketeers bound by irretrievable pledges of solidarity. All sought as much uniformity as possible, but their ideal in this regard was relative, not absolute." *Retail Clerks Union 1550, supra,* 117 App. D.C. at 340, 330 F.2d at 214.

B. The Union's contentions

The Union asserts (Br. 15) that the "real reason" for the Company's refusal to sign the 1968 agreement was its dissatisfaction with the results of the negotiations. As the Board recognized, dissatisfaction with the results of bargaining negotiations cannot in and of itself furnish a lawful basis for refusing to abide by the terms of the contract (A. 16, n. 11). *N.L.R.B. v. Tulsa Sheet Metal Works, Inc.,* 367 F.2d 55 (C.A. 10, 1966). In this context, however, phrasing the objection to the contract in terms of economic hardship is not the equivalent of expressing mere dissatisfaction, for the expected economic hardship from applying the Denver wage scale was the reason for the special treatment afforded Weld County contractors. In short, the Company was claiming its right in terms which reflected reliance on the underlying justification, rather than simply on the existence of the practice itself.

The Union also heavily relies (Br. 15-16) on the existence of the bargaining authorizations to NECA. These documents, however, had been executed *after* the 1963 and 1965 negotiations and served to confirm what had already been done (see, *supra*, pp. 8, 19). Moreover, in 1967, after the most recent of these authorizations, the Union recognized that, while NECA was the representative of all for other purposes, Weld County contractors were to be treated separately as to wages and economic benefits. The Union seeks to blunt the force of this argument (Br. 18) by asserting that even in 1967, the Weld County employers did not engage in bargaining directly with the Union concerning those special wage rates. What the Weld County contractors did do, however, was to accept arbitration of their separate rates. So far as appears, the Company was willing to accept such arbitration in 1968 as well, but the Union insisted that the Company accept the contract.

The Union's assertion (Br. 24) that the Board's decision "invites employers to place undisclosed restrictions on their bargaining representatives" is unfounded. The Board's decision is based, not on what the Company told NECA, but on what the Company *did* in prior negotiations to the Union's knowledge. Thus, the effect of the Board's decision is to encourage parties to multiemployer bargaining to make specific inquiries about whether previously asserted rights have been waived for purposes of current negotiations. We submit that such an approach is consistent with the voluntary nature of multiemployer bargaining, for a rule which holds a party only to what he has agreed to promotes real stability in bargaining. On the other hand, another well recognized principle – that insisting on separate bargaining as to specific issues cannot be used as a device to gain bargaining leverage – insures against abuse of this right. See *Retail Clerks Union Local 1550 v. N.L.R.B., supra,* 117 App. D.C. at 342, 330 F.2d at 216. As the Union apparently concedes, however, the Company was acting in good faith when it insisted on separate bargaining here.

Finally, the Union asserts (Br. 24-25) that the Board's decision was based on grounds other than those on which it was "primarily" tried and hence was arbitrary and capricious. The short answer to this contention is that whatever the Company's "primary" defense may have been, "past prerogative" was adverted to by the Trial Examiner at the hearing (A. 137) and by the Company in its brief to the Board. Moreover, the General Counsel, who had the burden of establishing the unfair labor practice, introduced evidence seeking to prove an undertaking by the Company to bargain on a multiemployer basis with respect to wages and other benefits. The "past prerogative" finding is, in effect, a determination that the General Counsel failed to establish the allegation that such a duty existed, and as charging party, the Union was free to offer additional evidence in this connection. *Spector Freight System, Inc.*, 141 NLRB 1110, 1111 (1963). Thus, the Union cannot contend that it was given no opportunity to litigage that issue. Cf. *N.L.R.B. v. United Nuclear Corp.*, 381 F.2d 972 (C.A. 10, 1967). See also, *N.L.R.B. v. WTVJ, Inc.*, 268 F.2d 346, 348 (C.A. 5, 1959), and cases cited.[16]

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16 The Union's reliance on *Western States Regional Council v. N.L.R.B.*, 125 App. D.C. 1, 365 F.2d 934 (1966) is thus misplaced. In *Western States*, this Court found that the Board had attributed to the employers a motivation for a lockout different from that alleged in the pleadings and asserted at the hearing.

CONCLUSION

For the reasons stated above, we respectfully submit that the petition for review should be denied.

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March 1970.

1-7

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 23,634

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 68, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR REVIEW OF A DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF OF PETITIONER

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*Cases or authorities chiefly relied upon are marked by asterisks.

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REPLY BRIEF OF PETITIONER

I.

The Board's Brief does not deny that the Board has permitted the Employer to make an untimely withdrawal from a multi-employer unit and to renounce a contract negotiated by its representative in such a unit

Counsel for the Board do not dispute the fundamental proposition that a party who makes an untimely withdrawal from a multi-employer unit is bound by the contract resulting from the multi-employer negotiations. They seek to avoid the application of this rule here simply by asserting that the Board made no finding that Employer executed a

timely withdrawal (Brief, 14). This assertion simply evades the issue because if the result of the Board's decision is to permit an untimely withdrawal and renunciation of a contract, then it is contrary to the well-established Board rules holding such action to be a violation of Section 8 (a) (5) of the Act. The cases establishing and applying that rule are set forth in the Opening Brief and need not be repeated here. The failure of the Board to make a finding on the issue of untimely withdrawal cannot avoid the application of the rule where the undisputed facts clearly demonstrate that Employer was a member of a multi-employer group, had agreed in writing to be bound by contracts negotiated by the group, and had not communicated to the opposing party any restriction on its bargaining representative nor any intention not to be bound until after the contract had been negotiated. The failure of the Board to make such findings is, in fact, a major error on which review is sought here.

II.

The evidence relied upon by the Board does not establish a past practice giving the Employer a prerogative to engage in separate negotiations nor any acquiescence by the Union in such a practice

The major thrust of Counsel's argument is that Employer had a prerogative to insist upon separate negotiations before being bound by the contract negotiated on its behalf by the employer-group. But Counsel are unable to establish the existence of such a prerogative by reference to the written agreements between the parties defining Employer's relationship to the group. Those documents (Cancellation Agreement, G.C. Ex. 17 App. 264; Bargaining Authorization Agreement, G.C. Ex. 4 App. 328, and Letter

of Assent, G.C. Ex. 3 App. 329) contain no reservations whatever and are clearly in conflict with the Board's finding that Employer had reserved a right to separate negotiations. Neither can Counsel establish any prerogative for separate negotiations by reference to any oral agreements or understandings between the parties because there is no such evidence of any such agreement or understanding in the record. Counsel are therefore forced to contend that, solely from the past practice of the parties, the Union should have understood that the Employer was reserving a right to have separate negotiations even though that reservation was contrary to the Employer's written authorizations and was never communicated to the Union.

The recitals of the past practices contained in the Board's brief do not establish any understanding as to separate negotiations because: (1) they do not show any practice of separate negotiations after Employer agreed to the cancellation of the separate agreements arrived at through separate negotiations, and (2) they fail to establish that the Union ever acquiesced in a practice of separate negotiations after the separate agreements were cancelled or even that the Union had any notice that Employer insisted upon separate negotiations.

The evidence cited in the Board brief as to the negotiations prior to 1965 is clearly irrelevant because Employer was not then a member of this multi-employer group and the parties were then negotiating separately for separate contracts. This relationship was unmistakably changed by the parties themselves when Employer agreed to be bound by the Area negotiations and authorized NECA to act for it in such negotiations.

The evidence that a wage differential was preserved in the 1966 and 1967 negotiations is also wide of the mark. At most it would tend to prove only that Employer had a prerogative to continue to enjoy some kind of a wage dif-

ferential, but this could not provide any justification for its refusal to sign the present contract because that contract also contains a wage differential. Moreover the 1966 and 1967 Agreements were consummated without separate negotiations[1] and are therefore not evidence that past practice gave the Employer a "prerogative" to insist on separate negotiations but instead are evidence directly to the contrary.

The evidence as to communications between the Employer and its representative, NECA, are not evidence of any past practice acquiesced in, or binding upon, the Union. The first mention of the matter in the Bulletin from NECA to Employer on Mar. 23, 1965 contains a proposal that a Weld County contractor be appointed "to act as advisor to the Area Negotiating Committee" and this is inconsistent with any understanding even between Employer and NECA that separate negotiations would be continued (G.C. Ex. 12, App. 290). The letter from Hecht (the NECA chief negotiator) to the Union on Dec. 27, 1966 (R. Ex. 11, App. 363) withdrawing proposals for Weld County rates and advising that the Weld County contractors stood "ready to meet and discuss" is not evidence as to any "practice" of separate negotiations particularly in view of the undisputed fact that the Agreement was thereafter consummated without such negotiations. Similarly the statement by the group representatives in the 1967 negotiations that the Weld County rates "would be *considered* by the people in the area covered by the same" (R. Ex. 10, App. 366) is not evidence that the Weld County employers were entitled to separate negotiations. In fact the NECA employers themselves did not believe that there was any prerogative for separate negotiations because they there-

[1]The reference in the 1967 Agreement that the changes were jointly "and *locally*" negotiated is meaningless in view of the undisputed fact that there were no separate negotiations between the Union and Employer in the negotiations preceding the Agreement.

after proceeded to negotiate those rates without separate negotiations. Moreover, the Union's prompt response to the statement—that if the Weld County employers were interested they should attend the group negotiations—clearly negates any understanding by the Union that there was any agreement to provide separate negotiations.

The overriding fact in all of the past practice referred to in the Board's findings and its brief is that after the Employer became a part of the area negotiations and agreed to be bound by the Area Agreement there is not a single "separate negotiation" upon which the Board can rely to establish either notice to, or acquiescence by, the Union in a practice giving the Employer the right to such negotiations as a condition of being bound by the written unrestricted authorization it had given to NECA to negotiate and sign a contract on its behalf.

There is no evidence that the Union had any "understanding" that the Employer reserved a right to separate negotiations. On the contrary, the Union's understanding was made perfectly clear at the outset of the 1967 negotiations when its representative stated:

> "Why aren't the representatives of the Larimer and Weld County areas here? . . . If they have any interest in these matters this is where the decisions are made concerning the entire jurisdiction and if they are interested they should be here." (App. 367).

In view of this clear statement of position and the further fact that the contract was later consummated without separate negotiations, it is simply impossible to conclude that the Union ever acquiesced in a practice which gave Employer a prerogative for separate negotiations.

The cases cited in the Board's brief which hold that deference should be given to the Board's factual determina-

tions because of its specialized judgment and expertise[2] cannot serve to supply facts which are not in the record or to justify inferences which do not follow from the facts in the record. *Retail Store Employees Union Local 400 v. NLRB,* 123 App. D.C. 360, 360 Fed. 2d 494 (1965). Cf. *NLRB v. Brown* 380 U.S. 278 (1965), *American Shipbuilding Co. v. NLRB,* 380 U.S. 300 (1965).

Throughout its brief the Board relies upon the decision in the *Kroger* case (141 NLRB 564 (1963)), enf'd in *Retail Clerks Union Local 1550 v. NLRB,* 117 App. D.C. 336, 330 Fed. 2d 210 (1965). We have pointed out in the Opening Brief (pp. 18, 19) the significant factual differences between that case and this one which enabled the Board to make findings both on past practice and notice to the Union in that case which are not possible here. This Court was careful in its decision in that case to point out that it was the Employer's conduct "vis a vis the Union, not the other employers" that was significant, and further that there was, in that case, "no express commitment by Kroger, either to the Union or to the other employers" to be bound by the contract. In this case there is both an express commitment to be bound and no conduct "vis a vis the Union" to alter or restrict the commitment. The Board's brief does not dispute or explain away any of these factors which distinguish the cases but simply attempts to extend the *Kroger* rationale to facts which will not support it.

III.

There is no duty on the Union to inquire as to the scope of the authority of the Employer's authorized bargaining representative

The Board suggests in its brief (p. 22) that the Union had a duty to make "specific inquiry" as to whether "pre-

[2]*NLRB v. Truck Drivers Union* 449, 353 U.S. 87 (1957), *Retail Clerks Union Local 1550 v. NLRB* 117 App D.C. 336, 330 Fed 2d 210 (1964), *NLRB v. United Insurance Co.,* 390 U.S. 254 (1968).

viously asserted rights had been waived." This assertion is in itself a recognition that there has been a failure to prove any notice to the Union of Employer's asserted right to separate negotiations and an attempt to shift to the Union the burden of inquiring as to whether the Employer is asserting such rights. We submit that there are no previously asserted rights involved here, nor any duty on the Union to make inquiry if there were such rights. The Union instead is entitled to rely on the written authorizations given by Employer to his own bargaining representative. To place a duty on the Union to question those authorizations or to refuse to recognize them without independent investigation would clearly disrupt the bargaining process and might well subject the Union to a charge of a lack of good faith by interfering with the Employer's right to designate its representative and to confer authority upon it.[3]

IV.

Employer's renunciation of the contract was not in good faith

The Board asserts in its brief (p. 22) that the "Union apparently concedes that the Company was acting in good faith when it insisted on separate bargaining here." There is no basis for that assertion. In fact, the Company's acceptance of the 1966, 1967 contracts without separate negotiations because it was satisfied with the results and its rejection on the present contract expressly for the reason that it was dissatisfied with the wage increases (G.C. Ex. 6, App. 326) amply demonstrate Employer's lack of good faith and its attempt to enjoy the fruits of multi-employer bargaining while at the same time avoiding its responsibilities.

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[3]Cf. *Ice Cream Employees, Teamsters Local 717 and Ice Cream Council,* 145 NLRB 865 (1964) where the Board referred to the Union's obligation to respect the integrity of the multi-employer unit.

V.

The Board's decision is based upon grounds other than those alleged in the pleadings and asserted at the hearing

The Board argues (p. 23) that the "prerogative established by past practice" theory on which the Decision and Order rests was adverted to by the Trial Examiner at the hearing and presented in Employer's brief to the Board. The citation to the record in the Board's brief (Tr. 146, App. 137) does not evidence any notice that a past practice theory was being relied upon. The reference is to a colloquy between the Trial Examiner and Employer's counsel in which counsel stated that Employer had asked its representative (NECA) for separate negotiations but at the same time counsel conceded that there was no "understanding" and that "the union may have thought something different." The fact that the Employer refers to the past practice theory in its brief to the Board only serves to confirm that the Board's decision is based on grounds other than those alleged in the pleadings and asserted at the hearing and is therefore arbitrary and capricious under *Western States Regional Council v. NLRB,* 125 App. D.C. 1, 365 Fed. 2d 934 (1966).

Respectfully submitted,

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